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# International Regulation of Commercial Whaling: The Consequences of Norway's Decision to Hunt the Minke Whale

By MARTHA HOWTON\*

## I. INTRODUCTION

In the summer of 1993, Norway announced to a shocked world that it would resume the commercial whaling of Minke whales in the North Atlantic.<sup>1</sup> Norway's announcement followed closely the May 1993 decision by the International Whaling Commission (IWC) to extend the moratorium against whaling, in effect since 1986, for at least one more year.<sup>2</sup> Norway justified its decision to hunt Minke whales for commercial uses by citing a report of the IWC Scientific Committee which stated that stocks of Minke whales had recovered enough to allow limited hunting.<sup>3</sup> The report of the Scientific Committee, which included a plan for limited harvesting of certain whale populations in certain areas, had been rejected by the IWC at its meeting in May of 1993.<sup>4</sup> Norway then embarked on a self-regulated plan for whaling, authorizing a catch of 296 Minke whales in the 1993 season, including 136 for scientific purposes.<sup>5</sup>

The reaction to Norway's announcement was tremendous. Fifteen nations signed a resolution condemning Norway's resumption of whaling.<sup>6</sup> Consumers in many countries began boycotting imports of Norwegian fish and fish products.<sup>7</sup> In the United States, the Com-

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\* Member of the Class of 1995. B.A. Yale University, 1992. I would like to thank Jennifer Swanson for her help in selecting this topic.

1. *Oslo Resumes Whaling Despite IWC Ban*, NIKKEI WKLY., June 14, 1993, at 11.

2. *Id.*

3. *Panel Ex-Chief Blasts IWC for Rejecting Management Plan*, Japan Economic Newswire, June 12, 1993, available in LEXIS, Asiapc Library, Jen File.

4. *Id.*

5. *Norway Ends 1993 Commercial Whale Hunt*, Reuter European Business Report, Sept. 15, 1993, available in LEXIS, Busfin Library, Reueub File.

6. *President Clinton Delays Whaling Sanctions on Norway*, BNA INT'L TRADE REP., Oct. 6, 1993, at 1678.

7. Greg McIvor, *Boycott of Norwegian Fish Products Starts in Australia*, Agence France Press, Aug. 16, 1993, available in LEXIS, News Library, Afp File; *Norway: Last-*

merce Department certified Norway under the Pelly Amendment to the 1967 Fisherman's Protective Act,<sup>8</sup> requiring the President to decide within sixty days whether trade sanctions were appropriate against the offending country for "diminishing the effectiveness" of the IWC treaty.<sup>9</sup> However, despite the United States obligation to help enforce the provisions of the International Whaling Commission, President Clinton decided on October 4, 1993 to delay the imposition of sanctions against Norway.<sup>10</sup> This decision was no doubt influenced by the deep political gratitude the American government felt for Norway. Earlier in the year, Norway had helped to bring about a successful conclusion to the Israeli-Palestinian peace negotiations.<sup>11</sup>

It therefore appears that effective enforcement of the IWC moratorium is completely lacking. If Norway is allowed to continue its whaling in violation of the moratorium, there is nothing to prevent other whaling countries, such as Japan and Iceland, from resuming commercial whaling as well. This Note will analyze the need for international cooperation in the regulation of whaling through a case study of Norway's decision to resume commercial whaling. It will cover the background of the controversy, including its history, and will evaluate the current IWC moratorium. It will discuss Norway's rights under international law and the rights of other nations to respond to Norway's actions with sanctions or other punitive means. It will analyze the role of the United States in enforcing the IWC treaty and explain why reliance on the United States has proven ineffective. Finally, it will explore alternatives for future enforcement of whaling regulations. This Note will propose that the only viable option available to prevent the resurgence of world-wide commercial whaling is for non-governmental organizations, such as Greenpeace, to put economic pressure on Norway and the other whaling countries.

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*Minute Attempts to Head off Whaling Trade Sanctions*, Inter Press Service, Oct. 1, 1993, available in LEXIS, Asiapc Library, Inpres File (Consumer boycotts in Germany and Great Britain); *Greenpeace Backs Supermarket Boycott of Norwegian Seafood*, Agence France Press, Nov. 25, 1993, available in LEXIS, News Library, Afp File.

8. *America Considering Import Ban in Norwegian Whaling Protest*, Press Association Newsfile, Aug. 7, 1993, available in LEXIS, Asiapc Library, Panews File; *Commerce Notifies President that Norway's Resumption of Whaling Is Basis for Embargo*, BNA INT'L TRADE DAILY, Aug. 18, 1993, available in LEXIS, BNA Library, Bna:td File.

9. 22 U.S.C. § 1978 (1988).

10. Andrea Shalal-Esa, *Clinton Delays Sanctions Against Norway on Whaling*, Reuters World Service, Oct. 4, 1993, available in LEXIS, World Library, Reuwld File.

11. Greg McIvor, *Norway Officials Dismiss Reports It May Halt Whaling*, Reuter European Business Report, Oct. 1, 1993, available in LEXIS, Busfin Library, Reueub File; *Norway: Last-Minute Attempts to Head off Whaling Trade Sanctions*, *supra* note 7.

## II. BACKGROUND

### A. *The Origins of the IWC Moratorium*

The International Whaling Commission was created in 1946 by Article III of the International Convention for the Regulation of Whaling (ICRW).<sup>12</sup> One of the stated goals of the IWC was to "establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks."<sup>13</sup> The IWC regulates hunting seasons, capture methods, and catch quotas for each species of great whale through schedules that are reviewed annually.<sup>14</sup> Amendments to the schedule quotas require a three-fourths majority vote.<sup>15</sup> The rapidly diminishing whale stocks made it necessary to create a system of regulation because the whaling industry was in danger of putting itself out of business through over-hunting.<sup>16</sup> During the first three decades of the IWC's existence, whale populations continued to decrease to even more dangerous levels.<sup>17</sup> The United States Marine Mammal Protection Act, passed in 1972, imposed a moratorium on the importation of whale products, including oil, baleen, and whale bone.<sup>18</sup> This moratorium helped to limit the objective of whale hunting to the acquisition of whale meat, but it did not end the hunting of whales.<sup>19</sup> Finally, in 1982, due partly to the addition of new member nations,<sup>20</sup> the anti-whaling countries in the IWC were able to gather the three-fourths majority necessary to

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12. Pat W. Birnie, *International Legal Issues in the Management and Protection of the Whale: a Review of Four Decades of Experience*, 29 NAT. RESOURCES J. 903, 908 (1989); International Convention for the Regulation of Whaling, Dec. 2, 1946, art. III, 62 Stat. 1716, 161 U.N.T.S. 361 [hereinafter ICRW].

13. ICRW, *supra* note 12, pmb1.

14. Benjamin van Drimmelen, Comment, *The International Mismanagement of Whaling*, 10 UCLA PAC. BASIN L.J. 240, 243 (1991).

15. ICRW, *supra* note 12, art. III, § 2. Amendments are restricted to those "necessary to carry out the objectives and purposes of this Convention . . . [and that are] based on scientific findings." *Id.*, art. V, § 2.

16. Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 29 (1991).

17. See Cynthia Taliaferro Bright, Note, *The Future of the International Whaling Commission: Can We Save the Whales?*, 5 GEO. INT'L ENVTL. L. REV. 815, 815-16 (1993).

18. Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361-1407 (1988)).

19. Dean M. Wilkinson, *The Use of Domestic Measures to Enforce International Whaling Agreements: A Critical Perspective*, 17 DENV. J. INT'L L. & POL'Y 271, 280 (1989).

20. D'Amato & Chopra, *supra* note 16, at 44.

pass an amendment declaring a moratorium on commercial whaling that would go into effect in 1986.<sup>21</sup>

### ***B. Weaknesses of the Moratorium***

There are four principal reasons why the moratorium has not been as effective as anti-whaling groups had hoped. First, the IWC does not have its own enforcement provisions. It depends on individual nations to police themselves and others.<sup>22</sup> Therefore, if the United States fails to enforce the IWC moratorium for political reasons, as is the case with Norway, there is little recourse.<sup>23</sup> In addition, the IWC only covers member countries, so nations can finance "pirate whalers" from non-IWC nations to whale for them in order to avoid restrictions.<sup>24</sup>

Second, Article V of the ICRW, which governs amendments to the IWC Schedule, provides that any government which files a timely objection to any amendment is exempted from the requirements of that amendment.<sup>25</sup> Objecting is an absolute right of all members, and the objection clause of the ICRW may only be changed by unanimous vote.<sup>26</sup> Norway, Japan, Peru, and the USSR all filed timely objections to the 1982 moratorium and therefore are not legally required to abide by that agreement.<sup>27</sup> The objection provision has the potential to severely limit the effectiveness of the quota system as well as the current moratorium.<sup>28</sup>

Third, a major hole in the IWC moratorium is the exception in Article VIII which allows whaling for the purpose of scientific research. Article VIII (1) states:

Notwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for the

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21. Valeria Neale Spencer, Comment, *Domestic Enforcement of International Law: The International Convention for the Regulation of Whaling*, 2 COLO. J. INT'L ENVTL. L. & POL'Y 109, 113 (1991).

22. ICRW, *supra* note 12, art. IV.

23. See Bright, *supra* note 17, at 822.

24. van Drimmelen, *supra* note 14, at 250.

25. ICRW, *supra* note 12, art. V.

26. *Id.*

27. van Drimmelen, *supra* note 14, at 250.

28. Objection clauses are typical in international environmental treaties to encourage participation by nations who would not be willing to join without the option to withdraw from unacceptable decisions. It may be argued that although the objection clause is a weakness of the Convention, it does guarantee greater participation by the international community.

purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit.<sup>29</sup>

By calling their hunting of whales "scientific research," whaling nations have managed to continue whaling activities during the moratorium, selling whale meat and other products in their domestic markets.<sup>30</sup> Japan, for example, offered dubious scientific reasons for its proposal to take over 800 Minke whales each year for ten years.<sup>31</sup> As a result of pressure from the United States and the IWC, Japan actually reduced its take to 228 whales in 1991 and 330 whales in the 1992-93 season.<sup>32</sup> The fact that whale carcasses sell for high prices on the Japanese market after the "research" is completed,<sup>33</sup> and the fact that the old Japanese whaling vessels are now used as "research" ships, both suggest that "scientific research" is a convenient way to avoid the regulations of the IWC.<sup>34</sup> Norway has also hunted hundreds of whales in the North Atlantic under the guise of "scientific research" since the moratorium was adopted.<sup>35</sup>

Finally, the IWC is required to base its decisions on accurate scientific data, but obtaining such data about whale populations is extremely difficult because a whale's sex and age is sometimes impossible to determine even after the whale has been killed.<sup>36</sup> Age is especially difficult to determine because all the great whales, except for the sperm whale, lack teeth, ruling out the common aging method of analyzing growth rings on teeth.<sup>37</sup> Therefore, scientists are often unable to calculate whale populations even when using the sex and age ratios of caught whales.<sup>38</sup> Norway's reliance on the report of the IWC Scientific Committee<sup>39</sup> to support its decision to resume whaling is therefore not necessarily as logical as it might seem.

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29. ICRW, *supra* note 12, art. VIII.

30. Bright, *supra* note 17, at 824.

31. *Id.*

32. *Id.* at 827-28.

33. *Id.* at 827.

34. *Id.* at 824.

35. *Id.* at 825.

36. van Drimmelen, *supra* note 14, at 247.

37. *Id.*

38. *Id.*

39. Panel Ex-Chief Blasts IWC for Rejecting Management Plan, *supra* note 3.

### C. *The Debate over the Purpose of the IWC*

During the decade before the adoption of the IWC moratorium, whaling and non-whaling nations became polarized over issues regarding the real purpose of the IWC.<sup>40</sup> This polarization continues today. Apart from a drive to maintain sufficient whale stocks for whaling purposes, findings that whales may be of comparable intelligence to humans has prompted some environmentalists to propose that whales are entitled to a right to life.<sup>41</sup> They argue that rather than being viewed as animals available to serve the needs of humans, "whales are entitled to consideration as moral entities."<sup>42</sup> Indications that whales suffer unconscionable amounts of pain when harpooned has strengthened conservationist arguments that whales should be protected.<sup>43</sup> According to this view, the IWC should work towards permanently outlawing all types of whaling. The recent establishment of a permanent Antarctic Ocean sanctuary for whales at the May 1994 meeting of the IWC<sup>44</sup> demonstrates the influence of the environmentalist perspective on the IWC's actions.<sup>45</sup>

However, whaling countries such as Iceland, Japan, and Norway reject environmentalists' emotional attachment to whales and view the marine mammals in the "same moral category as the cow" despite the indications of much higher intelligence.<sup>46</sup> Recently, the whaling countries began to protest the continued moratorium on whaling, complaining that the IWC had been intended to oversee the management of whaling but has since become a puppet of the moral crusade against whaling.<sup>47</sup> As one government official in Iceland remarked, "No Icelander is against whaling as such. We don't have an emotional relationship with whales—leave that to the Americans."<sup>48</sup> Whaling nations believe that whales should be managed in the same way as other marine resources, which would include hunting at a sustainable

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40. D'Amato & Chopra, *supra* note 16, at 39.

41. *Id.* at 49.

42. *Id.* at 61.

43. *Id.* at 24-25.

44. *Vote in Favour of a Sanctuary for Whales*, EUR. ENV'T, May 31, 1994, available in LEXIS, Envirn Library, Eurenv File.

45. See Christine Tierney, *Whale Sanctuary Highlights Shift in IWC Role*, Reuters World Service, May 28, 1994, available in LEXIS, World Library, Reuwlid File.

46. Benjamin Mee, *Halt the Brain Drain: Help the Whale*, INDEPENDENT, Aug. 23, 1993, at 15.

47. Lars Foyen, *Unsentimental Icelanders Determined to Resume Whale Hunting*, Reuter European Business Report, Oct. 13, 1993, available in LEXIS, Busfin Library, Reueub File.

48. *Id.*

level.<sup>49</sup> When the IWC refused to implement the proposals of the Scientific Committee for resuming limited whaling of certain species, whaling nations took it as a sign that "the IWC had become a whale protection organization rather than a body whose mission is to manage whaling operations."<sup>50</sup> As a result of the dissatisfaction of whaling countries regarding the decisions of the IWC, Iceland, Norway, and other nations have found enough support to form a rival whaling organization, called the North Atlantic Marine Mammal Committee (NAMMCO).<sup>51</sup> As yet, NAMMCO only regulates small whales not covered by the IWC, but it could expand its authority if dissatisfaction with the IWC increases.<sup>52</sup>

In an effort to show disgruntled pro-whaling nations that it had not abandoned its original purpose—the management of the whaling industry—the IWC approved a Revised Management Procedure (RMP) at the same time it established the Antarctic sanctuary.<sup>53</sup> The RMP includes a formula to calculate kill quotas should the moratorium be lifted.<sup>54</sup>

The strong feelings on both sides of the whaling controversy have created insurmountable obstacles which prevent the effective preservation of whale populations. Without consensus on the true goal of the IWC, there will always be disagreement over its decisions. Norway's deliberate flouting of the moratorium is an expression of the frustration that whaling nations have felt towards the IWC's regulations. It is an indication that something must be done to preserve international cooperation on this sensitive issue before more whaling countries follow Norway's lead.

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49. *Id.*

50. *Whaling: IWC Committee Chairman's Resignation a Shout of Protest*, EUR. ENV'T, July 6, 1993, available in LEXIS, Envirn Library, Eurenv File.

51. *Iceland to Follow Norway in Resuming Whaling Next Year*, Japan Economic Newswire, July 2, 1993, available in LEXIS, Asiapc Library, Jen File.

52. Bright, *supra* note 17, at 819.

53. The Antarctic Sanctuary, established in May 1994, creates a sanctuary for whales in which all whaling is prohibited. Both endangered and robust species are protected. The sanctuary was approved overwhelmingly by the IWC with a vote of twenty-three to one. Only Japan voted against it. Tierney, *supra* note 45.

54. Christine Tierney, *IWC Approves Whale Management Resolution*, Reuters World Service, May 27, 1994, available in LEXIS, World Library, Reuwld File.



### III. NORWAY'S LEGAL RIGHTS

#### A. *Norway's Arguments*

Because it is not bound by the IWC moratorium, Norway's resumption of commercial whaling is not a violation of international law.<sup>55</sup> Under Article V of the Convention, Norway is not held to the terms of any amendment to the IWC schedule if it files a timely objection.<sup>56</sup> Norway filed such an objection in the case of the moratorium.<sup>57</sup> Therefore, Norway's decision to whale is only a violation of the spirit rather than the letter of the IWC moratorium. In August of 1993, Norway's foreign minister insisted that Norway's whaling policy is "in line with international law and principles for a good policy on the environment."<sup>58</sup>

However, the debate is not over Norway's technical right to ignore the moratorium, which is admitted by all nations involved, but instead concerns the legality of the sanctions that other nations have imposed on Norway in response to Norway's resumption of commercial whaling.<sup>59</sup> One commentator argues that "it is not whaling countries . . . that are flouting the rules, but rather countries, including the U.S., whose opposition to commercial and research whaling undermines the spirit and letter of the 1946 [Convention]."<sup>60</sup> Although the United States laws, such as the Pelly and Packwood Amendments which will be discussed in Part IV, provide for sanctions to be imposed against a country whose actions "diminish the effectiveness"<sup>61</sup> of the Convention, "[i]t is not altogether clear whether it is lawful to impose . . . sanctions when a member merely exercises its unconditional right to be exempted from IWC schedule amendments by opting out."<sup>62</sup> The uncertainty is based on the underlying disagreement among member nations over the true purpose of the IWC: is it to protect whales or is it to provide for the survival of the whaling industry?<sup>63</sup>

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55. Susan Sabella, *Total Ban on Whaling*, USA TODAY, Jan. 27, 1994, at 6C.

56. ICRW, *supra* note 12, art. V.

57. van Drimmelen, *supra* note 14, at 250.

58. Stella Bugge, *Norway Will Not Give in on Whaling, Slams U.S. Move*, Reuters World Service, Aug. 11, 1993, available in LEXIS, World Library, Reuwl File.

59. See Milton M.R. Freeman, *Whale Hunts: Science, Not Sentiment, Should Be Guide*, OTTOWA CITIZEN, Aug. 4, 1993, at A9.

60. *Id.*

61. The Pelly Amendment, 22 U.S.C. § 1978 (1988); the Packwood-Magnuson Amendment of 1979, 16 U.S.C. § 1821(e)(2) (1988).

62. Spencer, *supra* note 21, at 119.

63. See *supra* Part II.C.

Norway argues that Minke whales are a renewable resource and that it is within its legal rights to manage the marine resources surrounding the nation in a responsible manner.<sup>64</sup> Norway also claims that whaling is a cultural tradition which coastal fishing families have engaged in for centuries.<sup>65</sup> Advocates of Norway's resumption of commercial whaling point to the United States protection of hunting by Alaskan natives of the endangered Bowhead whale as hypocritical.<sup>66</sup> Norway bases its claim that Minke whale stocks have become a renewable resource on the IWC Scientific Committee's finding that there are approximately 86,700 Minke whales in the North Atlantic and around 900,000 globally.<sup>67</sup> Norwegians have interpreted this report as implicitly recommending that the "protected" status of Minke whales be revised in light of the new findings.<sup>68</sup>

### *B. The Weaknesses of Norway's Arguments*

In fact, the IWC report did not conclude that a change was necessary in the "protected" status of Minke whales.<sup>69</sup> Despite the increased numbers of Minke whales claimed by the report,<sup>70</sup> the unreliable nature of whale-population estimates makes it impossible to verify Norway's assertion to any degree of certainty.<sup>71</sup> It is apparent that the number of Minke whales has increased, but the population is more depleted in the North Atlantic, where Norway is currently whaling, than in the Antarctic.<sup>72</sup>

Norway's argument that other nations have no legal right to impose sanctions on it for its commercial whaling activities is without merit. The IWC represents the international consensus, and Norway remains a member of the organization.<sup>73</sup> Norway may well be im-

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64. Per Kristian Pedersen, *Norway Embraces Resource Protection*, USA TODAY, Jan. 27, 1994, at 6C.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Sabella, *supra* note 55, at 6C.

70. Panel Ex-Chief Blasts IWC for Rejecting Management Plan, *supra* note 3.

71. Other estimates of Minke whale populations differ greatly from the rejected report of the IWC Scientific Committee. For example, a source at the European Environmental Bureau stated that the Minke whale population had decreased by almost three-quarters since 1940, making even limited hunting indefensible. Tony Samstag, *Brundiland Honour Is Withdrawn*, TIMES (London), July 20, 1993, available in LEXIS, World Library, Ttimes File.

72. Bright, *supra* note 17, at 845.

73. Sabella, *supra* note 55, at 6C.

mune from direct enforcement by the IWC because it properly filed an objection, but a country that has agreed to enforce the IWC's regulations should have the right to impose sanctions against any nation that engages in actions which violate the moral and political policies of the IWC.<sup>74</sup> For example, in 1984 the United States pressured Japan to withdraw its objection to the commercial whaling moratorium.<sup>75</sup> Although there was no actual certification by the Secretary of Commerce under the Pelly Amendment because Japan chose to withdraw its objection rather than risk sanctions,<sup>76</sup> this case demonstrates that the United States was willing to threaten sanctions even when the offending nation was within its legal rights. Whether the imposition of sanctions against Japan would have been legal was not tested. Japan viewed the agreement with the United States as a diplomatic move rather than a legal necessity.<sup>77</sup>

Unilateral enforcement of the spirit of the IWC is the primary way the IWC maintains any international credibility, as its capability to exercise authority on its own is minimal at best.<sup>78</sup> Because of the many weaknesses in its structure, the IWC must rely on individual nations, the United States in particular, to give teeth to its rules. However, the United States has its own political agenda and may not always place support of the IWC as its top priority. When Norway is within its legal rights to engage in whaling, it is difficult for the United States to justify hostile action toward an otherwise friendly nation.

#### IV. THE ROLE OF THE UNITED STATES

##### A. *The Pelly Amendment*

Since the mid-1960's the United States has pushed the IWC towards a more conservationist stance.<sup>79</sup> The IWC moratorium was primarily a result of the United States pressure.<sup>80</sup> In 1971, well before the IWC moratorium was passed, the United States Congress passed the Pelly Amendment to the 1967 Fisherman's Protective Act.<sup>81</sup> The

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74. Spencer, *supra* note 21, at 116.

75. *Id.* at 119.

76. *Id.*; see *infra* part IV.A. for a discussion of the Pelly Amendment.

77. Spencer, *supra* note 21, at 119.

78. *Id.* at 115.

79. Stephen M. Hankins, Comment, *The United States Abuse of the Aboriginal Whaling Exception: A Contradiction in United States Policy and a Dangerous Precedent for the Whale*, 24 U.C. DAVIS L. REV. 489, 492 (1990).

80. *Id.* at 492, 501.

81. Pelly Amendment, Pub. L. No. 92-219, 85 Stat. 786 (1954) (codified at 22 U.S.C. § 1978 (1988)).

amendment was a response to a fisheries conflict with Denmark,<sup>82</sup> but the legislators also intended to authorize trade sanctions against any country that violated provisions of the International Whaling Commission.<sup>83</sup>

The Pelly Amendment provides that a nation which engages in activities that "diminish the effectiveness of an international fishery conservation program" will be certified by the Secretary of Commerce.<sup>84</sup> Following receipt of the certification, the President has sixty days to decide whether fishing products from the country in question should be excluded from the United States.<sup>85</sup> This decision is entirely discretionary,<sup>86</sup> but the President must notify Congress if an option other than a total embargo on the fishing exports of the violating nation is chosen.<sup>87</sup>

The Pelly Amendment has been used several times by the United States to support decisions of the IWC.<sup>88</sup> For example, in November 1974 Japan and the Soviet Union were certified for exceeding IWC quotas for Minke whales.<sup>89</sup> Both countries agreed to respect quotas in the future, but the Soviet Union was again certified in April 1985 for exceeding Minke whale quotas.<sup>90</sup> Norway was certified in 1986 for hunting Minke whales in violation of the moratorium.<sup>91</sup> In response to the Pelly certification, Norway promised to cease commercial whaling at the end of 1987.<sup>92</sup> However, in the same statement, Norway announced plans to continue whaling for scientific reasons.<sup>93</sup>

Because the President has discretion to refuse to impose any sanctions under the Pelly Amendment, its effect has been largely disappointing. In the years since its implementation, no sanctions have actually been imposed.<sup>94</sup> However, as the above examples demonstrate, often the threat of sanctions can be enough to convince the offending nation to reconsider its actions.<sup>95</sup> For example, in 1984 Ja-

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82. Wilkinson, *supra* note 19, at 280.

83. Bright, *supra* note 17, at 830.

84. 22 U.S.C. § 1978(a)(1) (1988).

85. *Id.* § 1978(b).

86. *Id.*

87. Wilkinson, *supra* note 19, at 280.

88. *Id.*

89. *Id.* at 281.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 282.

94. Spencer, *supra* note 21, at 117.

95. Wilkinson, *supra* note 19, at 281.

pan opted out of the moratorium and continued commercial whaling but later agreed to withdraw its objection and halt commercial whaling rather than risk being certified by the United States.<sup>96</sup> In contrast, the current crisis over Norway's resumption of whaling may indicate a new attitude on the part of whaling nations, who may no longer respond to the mere threat of sanctions.

### ***B. The Packwood-Magnuson Amendment***

In 1979, when it became apparent that presidential discretion in implementing the Pelly Amendment limited its effectiveness, Congress passed the Packwood-Magnuson Amendment to the 1976 Fishery Conservation Act.<sup>97</sup> The Packwood Amendment provides for an automatic reduction in the violator's allocation of fish in the United States economic zone,<sup>98</sup> which extends 200 miles from the shore.<sup>99</sup> Unlike the Pelly Amendment, the Packwood Amendment does not grant the President any discretion in imposing sanctions. Once a country is certified, the sanctions go into effect automatically.<sup>100</sup> The fishing privileges of the offending nation in United States waters must be reduced by no less than fifty percent once a nation is certified.<sup>101</sup> Also, a certification under the Packwood Amendment is, by definition, a certification under the Pelly Amendment.<sup>102</sup> Packwood certifications have occurred twice since the amendment's inception.<sup>103</sup>

In some cases a reduction in fish allocations can be absolutely meaningless, as was the case when President Reagan reduced Japan's fishing allocation by one hundred percent in response to Japan's overreaching scientific whaling proposal in 1988.<sup>104</sup> Japan's fishing allocation had already been set at zero to avoid overfishing, and so the sanctions had no deterrent effect whatsoever.<sup>105</sup>

Congress's attempt to force the President to impose sanctions on countries that violate the IWC rules indicates the seriousness with

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96. Spencer, *supra* note 21, at 119.

97. Packwood-Magnuson Amendment of 1979, 16 U.S.C. § 1821(e)(2) (1988).

98. *Id.* § 182(e)(2)(B).

99. Bright, *supra* note 17, at 831 n.113.

100. Gene S. Martin, *Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments*, 17 DENV. J. INT'L L. & POL'Y 293, 294 (1989).

101. *Id.* at 297.

102. *Id.*

103. *Id.* at 298.

104. *Id.* at 305-06.

105. *Id.*

which Americans view their role as the leaders of the whale conservation movement. However, despite this determination to support the IWC, other American political interests have superseded the protection of whales, as the case of *Japan Whaling Association* demonstrates.<sup>106</sup>

### C. *Japan Whaling Association*

The Packwood Amendment was intended to limit the President's discretion and thus shield the whaling issue from political pressure.<sup>107</sup> However, in 1986 the Supreme Court drastically limited the impact of the Packwood Amendment in *Japan Whaling Association v. American Cetacean Society*.<sup>108</sup> That case gave the Secretary of Commerce greater discretion in the initial certification decision by denying that the Packwood Amendment required the certification of every nation exceeding IWC quotas.<sup>109</sup>

In *Japan Whaling Association*, the American Cetacean Society filed suit seeking a writ of mandamus to force the Secretary of Commerce to certify Japan for IWC quota violations.<sup>110</sup> Instead of using the certification process, the United States had entered into negotiations with Japan which resulted in a promise by Japan to end commercial whaling by 1988.<sup>111</sup> The Supreme Court found that the Amendment was not intended to strip the Secretary of Commerce of all discretion in deciding which activities diminish the effectiveness of a treaty.<sup>112</sup> The Court upheld the Secretary's refusal to certify Japan and consequently weakened the effectiveness of the Packwood Amendment.<sup>113</sup>

Therefore, as the situation now stands, both the Secretary of Commerce—in deciding whether or not to certify a country—and the President—in choosing what sanctions, if any, to apply—are subject to political pressures.<sup>114</sup> In his dissent in *Japan Whaling Association*, Justice Marshall pointed out with frustration that “the Court's decision today leaves Congress no closer to achieving that goal [of deterring

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106. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986).

107. Bright, *supra* note 17, at 831.

108. *Japan Whaling Ass'n*, 478 U.S. at 221.

109. Melinda K. Blatt, Note, *Woe for the Whales: Japan Whaling Association v. American Cetacean Society*, 55 U. CIN. L. REV. 1285, 1293 (1987).

110. *Japan Whaling Ass'n*, 478 U.S. at 228.

111. *Id.* at 227-28.

112. *Id.* at 239.

113. *Id.* at 241; Bright, *supra* note 17, at 832.

114. See Bright, *supra* note 17, at 832-35.

the killing of whales] than it was in 1971, before either amendment was passed."<sup>115</sup>

#### *D. The United States Response to Norway*

*Japan Whaling Association* set the stage for the current difficulties that the IWC is having in enforcing its regulations.<sup>116</sup> Despite overwhelming congressional support of sanctions against Norway for its resumption of commercial whaling,<sup>117</sup> President Clinton declined to impose them.<sup>118</sup> The Supreme Court's decision in *Japan Whaling Association* allowed the President to decide, in October 1993, that it would be more politically expedient simply to threaten sanctions against Norway rather than embarrass that nation after it played a key role in brokering the recent Middle East peace agreement.<sup>119</sup> White House spokeswoman Marla Romash said Norway's longstanding NATO participation and its help on other environmental issues also factored into Clinton's decision not to impose sanctions at that time.<sup>120</sup> In addition to recognizing Norway's status as a staunch long-time ally, Clinton was under pressure from supporters of the North American Free Trade Agreement who were concerned about the possible repercussions of using economic sanctions for environmental controversies.<sup>121</sup> Clinton directed that a list of potential sanctions be prepared, but he decided to wait to impose them until "all good faith efforts to persuade Norway to follow agreed conservation measures" had failed.<sup>122</sup> As of May 1994, the Clinton Administration was still "working through this with Norway"<sup>123</sup> and sanctions were still an empty threat. Clinton hoped that Norway would decide on its own to follow the whaling guidelines,<sup>124</sup> but that does not seem likely to occur.<sup>125</sup>

In fact, it seems more likely that Norway will continue and even expand its commercial whaling<sup>126</sup> and that other countries may soon

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115. *Japan Whaling Ass'n*, 478 U.S. at 249 (Marshall, J., dissenting).

116. See Bright, *supra* note 17, at 832-35.

117. McIvor, *supra* note 11.

118. *President Clinton Delays Whaling Sanctions on Norway*, *supra* note 6, at 1678.

119. Shalal-Esa, *supra* note 10.

120. *Id.*

121. *President Clinton Delays Whaling Sanctions on Norway*, *supra* note 6, at 1678.

122. *Id.*

123. *Clinton Still Weighing Sanctions over Whaling Dispute with Norway*, BNA INT'L ENV'T DAILY, May 20, 1994, available in LEXIS, Envirn Library, Bnaied File.

124. *President Clinton Delays Whaling Sanctions on Norway*, *supra* note 6, at 1678.

125. Bugge, *supra* note 58.

126. *Id.*

follow suit.<sup>127</sup> Norwegian foreign minister Johan Joergen Holst was quoted as saying "[w]e intend to stand firm when it comes to Minke whaling."<sup>128</sup> In the current situation with Norway, it is becoming apparent that the threat of sanctions will not have sufficient impact to dissuade the Norwegians from whaling, possibly because the United States has never followed through with sanctions in the past.<sup>129</sup>

The crisis with Norway could easily determine the future effectiveness of the IWC, and thus President Clinton's refusal to impose sanctions is of crucial importance to the entire international community.<sup>130</sup> Norway's return to commercial whaling and President Clinton's failure to impose sanctions under either the Pelly or Packwood Amendments leave the IWC without any way of asserting its authority. Without the United States as its champion, the IWC is powerless to prevent a resurgence of commercial whaling that could, quite possibly, lead to the extinction of the great whales.<sup>131</sup>

It is easy to call for automatic sanctions that "should be imposed for violations and lifted only upon actual compliance,"<sup>132</sup> but this argument ignores the political realities that the President must face when deciding whether to sanction another country, especially one that is a valuable ally such as Norway. Because of the many political concerns, it may be wiser to look for other ways to enforce the IWC rules, rather than relying entirely on the United States to be the policeman of the IWC.

## V. POSSIBLE SOLUTIONS TO THE WHALING DILEMMA

### A. *Suggested Solutions*

With the IWC powerless and the United States politically and, in Norway's view, legally<sup>133</sup> handcuffed, we must look for other ways to regulate whaling. There are several options, each with its own drawbacks.

First, some have suggested that another international treaty, such as The Convention on International Trade in Endangered Species of

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127. Foyen, *supra* note 47.

128. Bugge, *supra* note 58.

129. Andrea Shalal-Esa, *Norway's PM Tries to Avert US Whaling Sanctions*, Reuters World Service, Sept. 29, 1993, available in LEXIS, World Library, Reuwld File.

130. Shalal-Esa, *supra* note 10.

131. Hankins, *supra* note 79, at 498.

132. Spencer, *supra* note 21, at 125.

133. See *supra* part III.



Wildlife Fauna and Flora (CITES), that has proved more effective than the IWC, could be used to increase the protection of whales.<sup>134</sup> CITES has been effective in preventing the trade of whale meat by pirate whalers who are not members of the IWC.<sup>135</sup> The goal of CITES is to protect ecosystems and habitats rather than simply to protect endangered animals from hunting.<sup>136</sup> When CITES has been most effective, for example in banning the trade of ivory from elephant tusks, there has been an international consensus and full cooperation from all countries involved.<sup>137</sup> The reason for this success may be that the goals of CITES focus on protecting species, while the IWC's stated goal is the development of the whaling industry.<sup>138</sup> Japan, for example, used to import a great deal of ivory, but in recent years has cooperated with the CITES ban.<sup>139</sup>

In the case of whaling, however, the international arena is polarized into whaling and anti-whaling camps.<sup>140</sup> Since the IWC is not succeeding, it is doubtful that trying to use CITES to protect whale habitats would succeed either, absent the essential element of full international cooperation.<sup>141</sup>

Second, the IWC could be modified to remove its crippling weaknesses.<sup>142</sup> The scientific research exception, which is responsible for the slaughter of hundreds of whales every year, and the objection provision, which makes it legal for Norway to hunt whales commercially,<sup>143</sup> would have to be removed for the IWC to be a comprehensive and effective organization for the protection of whales. However, removing either of these provisions would be opposed by the whaling countries and could lead to those countries withdrawing from the IWC, which would defeat the purpose of any modifications.<sup>144</sup> Another possibility is to discard the IWC as it exists now and to replace it with a different structure to oversee and regulate the whaling countries. Because the goal of the IWC is officially to maintain and regulate the whaling industry, not to save the whales, the

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134. Bright, *supra* note 17, at 838-46.

135. *Id.* at 841.

136. *Id.*

137. *Id.* at 841-42.

138. *Id.* at 841.

139. *Id.* at 842.

140. *Id.*

141. *Id.* at 842-44.

142. *Id.* at 846-47.

143. Spencer, *supra* note 21, at 113.

144. Bright, *supra* note 17, at 846.

whaling countries understandably reject the idea of an indefinite moratorium.<sup>145</sup> However, creating another organization whose purpose it was to save the whales would have the same problem of alienating the whaling countries as would modifying the purpose of the existing IWC. The new organization would undoubtedly not include the whaling nations, and therefore would have little control over them.

Third, Congress could pass additional legislation to overturn the holding in *Japan Whaling Association*, in the same way it passed the Packwood Amendment in an attempt to remedy the weaknesses of the Pelly Amendment. Popular opinion in the United States is in favor of sanctions against nations that engage in whaling,<sup>146</sup> but the fate of Pelly and Packwood when confronted with international political realities suggests that Congress may be unable to force the executive branch to take action when it is not otherwise politically wise for the United States. Whaling is simply not considered enough of an offense to warrant a punishment as severe as the sanctions these amendments prescribe. Unfortunately, it appears that whaling countries have come to realize this and no longer consider the possibility of sanctions from the United States or other countries as a real threat.<sup>147</sup>

### **B. Consumer Boycotts**

The option most likely to succeed in protecting the whales is action by independent international groups such as Greenpeace. In 1993, Greenpeace sponsored consumer boycotts against Norway that resulted in a tremendous loss in profits for the Norwegian fishing industry.<sup>148</sup> International firms such as Burger King have cancelled contracts with Norway worth millions of dollars.<sup>149</sup> One British supermarket chain alone cancelled 4.5 million dollars worth of fish-products orders to protest Norway's resumption of commercial whaling.<sup>150</sup> In August of 1993, a boycott was launched in Australia where at least 408 million dollars worth of Norwegian fish products are imported annually.<sup>151</sup> Greenpeace claims that boycotts in Germany, the United States, and Great Britain have cost Norway some 60 million

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145. *Id.* at 848.

146. See Freeman, *supra* note 59, at A9.

147. Shalal-Esa, *supra* note 10.

148. *Norway Welcomes U.S. Whaling Decision*, Reuter European Business Report, Oct. 4, 1993, available in LEXIS, Busfin Library, Reueub File.

149. Joshua Wine, *Big Fish Running out of Patience with Norway's Refusal to Toe Whaling Line*, GUARDIAN, May 28, 1994, available in LEXIS, News Library, Guardn File.

150. *Greenpeace Backs Supermarket Boycott of Norwegian Seafood*, *supra* note 7.

151. *Boycott of Norwegian Fish Products Starts in Australia*, *supra* note 7.

dollars,<sup>152</sup> although Norway estimates it has lost only a fraction of that amount.<sup>153</sup> Because it is not restrained by political pressures, well-organized private action can be a powerful weapon.<sup>154</sup>

However, the boycotts currently in progress have not stopped Norway from whaling. According to Greenpeace estimates, Norway has lost over 45 million dollars in export revenues because of a whaling industry that is worth only about 4 million dollars.<sup>155</sup> The Norwegian government has stated that despite the losses, Norway will continue to whale as a matter of "principle."<sup>156</sup>

Nonetheless, there must be some point at which Norway would be losing so much income from protest boycotts that it simply would not be able to afford to continue whaling. Norway's fish exports to the United States are worth about 70 million dollars, and total exports to the United States are valued at 1.58 billion dollars.<sup>157</sup> Even if sanctions are not imposed, it is still possible for the same crippling economic effect to be achieved through voluntary consumer boycotts of Norwegian imports. It would require a great deal of organization and publicity, but it appears to be the most effective way to enforce the IWC whaling moratorium in the absence of concrete action by the United States government.

## VI. CONCLUSION

The international community, represented by the majority at the International Whaling Commission, voted in May 1993 to extend the moratorium on commercial whaling.<sup>158</sup> In May 1994, the IWC again renewed the moratorium for at least another year.<sup>159</sup> Norway began commercial whaling in 1993 despite the ban endorsed by the international community.<sup>160</sup> If the international consensus is to mean anything there must be the means to enforce it. Yet every enforcement

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152. *Whaling Cost Norway \$60 Million in Lost Exports—Greenpeace*, Reuter European Business Report, Feb. 22, 1994, available in LEXIS, Europe Library, Reueub File.

153. Wine, *supra* note 149; see *Norway: Whaling Has Not Had Adverse Effect on Exports*, DAGENS NAERINGS LIV, Mar. 9, 1994.

154. Spencer, *supra* note 21, at 122.

155. *Norway Welcomes U.S. Whaling Decision*, *supra* note 148.

156. McIvor, *supra* note 11.

157. Hugh Carnegie, *Norway Seeks U.S. Go-ahead for Whaling*, FIN. TIMES, Oct. 6, 1993, at 8.

158. *Oslo Resumes Whaling Despite IWC Ban*, *supra* note 1.

159. *IWC to Put off Commercial Whaling Revival Again*, Jiji Press Ticker Service, May 26, 1994, available in LEXIS, Asiapc Library, Jiji File.

160. *Oslo Resumes Whaling Despite IWC Ban*, *supra* note 1.

mechanism appears to have failed in this instance because Norway successfully completed a second season of commercial whaling in August of 1994.<sup>161</sup> Norway's example has shown the other whaling nations that there are no effective obstacles to prevent them from resuming commercial whaling themselves.

The upcoming IWC meeting in May 1995 will determine whether the moratorium will be extended another year or whether limited harvesting of Minke whales will be permitted.<sup>162</sup> Legal, regulated commercial whaling may be preferable to unlimited illegal whaling by all whaling nations, but in light of the uncertain scientific evidence regarding whale populations, the moratorium should be renewed. If whaling nations continue to engage in whaling in violation of the moratorium, the best possible method of discouraging whaling, absent sanctions by the United States, is a well-organized consumer boycott.

If no action is taken, we are likely to drive the whales to extinction. One commentator has pessimistically stated that effective protection of whales is impossible because "it may be that some harvest-sensitive resources simply defy management under international law."<sup>163</sup> We must hope that this view is proven incorrect and that we can find a way to save the whales before it is too late.

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161. See *Norway Ends 1993 Commercial Whale Hunt*, *supra* note 5; see also *Norway's 1994 Commercial Whale Hunt Ends*, Reuter's World Service, Aug. 29, 1994, Available in LEXIS, World Library, Reuwlid File.

162. Carnegy, *supra* note 157, at 8.

163. van Drimmelen, *supra* note 14, at 259.

